

NO. 43039-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDUARDO SANDOVAL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 10-1-04055-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State present sufficient evidence to support defendant's convictions for murder in the first degree, assault in the first degree, and conspiracy to commit murder in the first degree?

B. STATEMENT OF THE CASE.

1. Procedure

On September 23, 2010, the State charged EDUARDO SANDOVAL, hereinafter "defendant," with one count of murder in the first degree (Count I), one count of attempted murder in the first degree (Count II), and one count of conspiracy to commit murder in the first degree (Count III). CP 1-3. The State alleged that defendant had been an accomplice to Counts I and II, and that either he, or an accomplice, had been armed with a firearm during the commission of the crimes. CP 1-3. On September 30, 2011, the State filed an amended information, altering Count II to assault in the second degree and adding gang aggravators to all three counts. CP 82-83. On October 11, 2011, the State filed a second amended information, changing Count II from assault in the second degree

to assault in the first degree, also with a firearm and gang aggravator. CP 85-86.

Jury trial commenced on October 31, 2011, before the Honorable Linda CJ Lee. RP 560. Defendant was tried with co-defendants Jarrod Messer, Saul Mex, Time Time, and Dean Salavea. CP 59-63; RP 3, 560. On January 4, 2012, during the presentation of the State's case, co-defendant Time entered a guilty plea. RP 3485-3504. At the close of the State's case, the remaining defendants moved for dismissal of the charges citing lack of evidence to convict. RP 3829-30. Co-defendant Messer entered a guilty plea after the dismissal arguments but before the court issued its ruling. RP 3552-64.

On January 5, 2012, the court denied the defendants' motion to dismiss. RP 3567-77. Defendant rested without presenting evidence. RP 3586. The court also accepted co-defendant Mex's plea of guilty. RP 3591-608.

On January 6, 2012, as all of defendant's co-defendants had entered guilty pleas, the State moved to reopen its case-in-chief in order to present defendant's interview¹ with police in its entirety. RP 3611. The

¹ The interview had already been presented to the jury, with substantial redactions under *Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). See RP 3212-13; Exhibits 5 and 5F. The audio recording of the same interview was admitted as Exhibit 138. RP 3646.

court allowed the State to reopen its case over defendant's objection. RP 3625. An audio recording of the interview was presented to the jury. RP 3646; Exhibit 138. Defendant again rested without presenting any evidence. RP 3646.

On January 12, 2012, the jury found defendant guilty as charged, including findings that defendant, or an accomplice, was armed with a firearm during the commission of the crimes and that each crime was committed with the intent to cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership. CP 352, 354, 355, 357, 358, 359, 360, 361; RP 3771-73.

On February 3, 2012, the court sentenced defendant to the high end² of each count, and ordered all counts to be served consecutively to each other and to each firearm sentence enhancement, for an exceptional sentence of 904 months in custody. CP 366-79; RP 3795-97.

Defendant filed a timely notice of appeal. CP 380-94.

² Defendant had an offender score of 3 for Count I, giving him a standard range of 271-361 months, together with a 60-month firearm sentence enhancement. CP 366-79. Defendant had an offender score of 0 on the remaining counts, giving him a standard range of 180-240 months on Count II and 93-123 months on Count III. CP 366-79; *see* RCW 9.94A.589(b). Defendant received 60-month firearm sentence enhancements on Counts II and III, as well. CP 366-79.

2. Facts

On February 5, 2010, Carlos Basilio, a member of the Eastside Lokotes Sureños (ELS) street gang, was at a local bar with other members of the gang, including defendant. RP 2525, 2531. As the men were leaving the bar, an unknown person in a green car started shooting at them, eventually hitting Naitaalii Toleafoa, a fellow ELS member. RP 2531-33. Mr. Basilio believed that it was a rival gang that fired on them. RP 2539.

Juan Zuniga, the leader of the ELS, ordered the other members to meet him the following day to discuss retaliation. RP 2544. Alfredo Villagomez, Antonio Gonzalez, and Mr. Basilio were three of the gang members present at the meeting. RP 937-38; 1922-23, 2544. All three men saw defendant present at the meeting. RP 938, 1922, 2544.

Mr. Villagomez testified that the discussion at Mr. Zuniga's house centered on retaliation against the Pirus, a gang affiliated with the Bloods. RP 931-36. Mr. Villagomez understood that retaliation meant to look for and shoot Pirus. RP 964.

Mr. Zuniga gave each of the gang members specific roles. RP 949-50, 964, 975, 1193, 1929, 2546. According to Mr. Gonzalez and Mr. Basilio, refusal was not an option for any member of the gang because the gang's reputation was all-important. RP 1924-25; 2584.

The ELS members met again on February 7, 2010. RP 1932-33. Mr. Time and Mr. Salavea had stolen a van to use in the retaliation. RP 1929. Mr. Zuniga directed Mr. Messer to drive the stolen van and Mr. Mex to shoot at the targets from the van. RP 1929. Mr. Zuniga directed defendant and Mr. Gonzalez to be on the lookout on the east side of Tacoma for potential targets and police officers. RP 1193, 1917, 1930, 1936-37, 2040-41.

As Mr. Gonzalez drove around the east side of Tacoma, he and defendant observed police officers near 72nd Street and Portland Avenue. RP 1918. Defendant called Mr. Zuniga to inform him of the officers' location. RP 1918, 2048.

Meanwhile, the men in the stolen van came upon a red Ford Escort driven by Camille Love. RP 591-92. Ms. Love's younger brother, Joshua Love, was the only other person present in the car. RP 591. Mr. Love saw the van next to them when they were stopped at a light. RP 592. The driver gave him a "rude look," which Mr. Love returned. RP 592. The van started following them. RP 595.

A few moments later, the van pulled up next to Mr. Love's side of the car and his window shattered. RP 595. Mr. Love tried to move into the back seat of the car, but got stuck between the front seats. RP 595. He heard bullets hit the car and felt one hit his hip. RP 595.

When the shooting stopped, Mr. Love sat back down in the passenger seat. RP 597. He did not see the van anymore, but he noticed that the car was beginning to drift into the oncoming traffic. RP 598. Mr. Love grabbed the wheel and used the parking brake to stop the car. RP 598.

The car came to a stop near the intersection of 56th Street and Portland Avenue. RP 608. Mr. Love got out of the car and tried to flag down passing motorists. RP 608. Mr. Love looked at the car and saw Ms. Love's head back and there was blood coming from her mouth. RP 612.

Mr. Villagomez was not in the van during the shooting, but he was nearby and identified the stolen van as the source of the shots fired on the Ford Escort. RP 978-79, 991-92. Mr. Villagomez saw the driver of the Escort still in the front seat with her head near the window and saw the passenger exit the car in an attempt to get help. RP 995-96.

Joshua Love had been hit with two bullets; one in his right arm and one on the right side of his torso. RP 617. According to the medical examiner, Sigmund Menchel, Camille Love died of three gunshot wounds to her back. RP 1558, 1565.

The stolen van was found abandoned nearby, with the motor still running, and left in the middle of the street. RP 1736. The windows on the driver's side of the van were missing, and officers observed bullet

holes which appeared to have been made from the inside of the van. RP 1737. Shell casings were recovered from the van. RP 1737.

Sometime after the shooting, Mr. Bastilio was at a grocery store with defendant when they saw a poster offering a reward for anyone with information regarding the shooting of Camille Love. RP 2567, 2570-71. Defendant informed him that the picture showed the girl they killed. RP 2569-71. Mr. Bastilio started laughing. RP 2570. Mr. Bastilio and defendant also took Mr. Messer to Mexico when they realized that Mr. Messer was a suspect in the shooting. RP 2564-66.

On September 22, 2010, defendant was interviewed by Tacoma Police Detectives Dan Davis and Steve Reopelle. Exhibits 5, 5E, 5F, and 138. While defendant claimed he did not know that a shooting was going to take place that night, he admitted that he knew that the plan was to retaliate against rival gang members if they happened to find any targets. Exhibits 5, 5E, 5F, and 138. Defendant also admitted that Mr. Zuniga ordered him to patrol the east side of Tacoma and call him if he saw any police or targets in the area. Exhibit 5, 5E, 5F, and 138. While defendant claimed he never did as Mr. Zuniga told him, he also stated that he did not have the authority to decline and that he did speak to Mr. Zuniga by cell phone that night. Exhibit 5, 5E, 5F, and 138.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCED TO CONVINCE A RATIONAL FACT FINDER THAT DEFENDANT WAS GUILTY OF MURDER IN THE FIRST DEGREE, ASSAULT IN THE FIRST DEGREE, AND CONSPIRACY TO COMMIT MURDER IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. The State presented sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of murder in the first degree and assault in the first degree.

A person commits the crime of murder in the first degree when, under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person and thereby causes the death of a person.

CP 319-351 (Jury Instruction 12); RCW 9A.32.030(1)(b). “A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a firearm.” CP 319-351 (Jury Instruction 15), RCW 9A.36.011(1)(a).

A person is an accomplice to the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests such other person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 319-351 (Jury Instruction 6); *see also* RCW 9A.08.020(3); ***State v. Brown***, 147 Wn.2d 330, 338, 58 P.3d 889 (2002). For accomplice liability to attach, a defendant must knowingly aid in the commission of the specific crime charged. ***Brown***, 147 Wn.2d at 338. The accomplice liability statute requires only a mens rea of knowledge, and an actus reus of soliciting, commanding, encouraging, or requesting the commission of the crime, or aiding or agreeing to aid in the planning of the crime. ***State v. Roberts***, 142 Wn.2d 471, 502, 14 P.3d 713 (2000) (citing RCW 9A.08.020(3)(a)).

The Court in ***Roberts*** specifically adhered to the holdings in ***State v. Davis***, 101 Wn.2d 654, 682 P.2d 883 (1984) and ***State v. Rice***, 102 Wn.2d 120, 683 P.2d 199 (1984), stating, “an accomplice need not have knowledge of each element of the principal’s crime in order to be convicted under RCW 9A.08.020. General knowledge of ‘the crime’ is sufficient.” ***Roberts***, 142 Wn.2d at 513.

Here, it is uncontroverted that members of defendant’s gang engaged in a drive-by shooting which resulted in the death of Camille Love and gunshot injuries to Joshua Love. Taken in the light most favorable to the State, there was sufficient evidence to support the jury’s finding that defendant aided in the commission of the shooting when he acted as a lookout for police and potential targets on the night his gang

planned retaliation. Defendant never declined the role assigned to him by Mr. Zuniga and, in fact, drove with Mr. Gonzalez to the east side of Tacoma, the location he was ordered to patrol. Exhibit 5, 5E, 5F, 138; RP 1193, 1917, 1930, 1936-37, 2040-41. Mr. Gonzales, who was driving the car, testified that defendant called Mr. Zuniga to report police presence. RP 1918, 2048. The jury determined that Mr. Gonzalez's testimony was credible. As a challenge to the sufficiency of the evidence accepts all of the State's evidence as true, Mr. Gonzalez's testimony was sufficient to convince a rational fact finder that defendant participated in the drive by shooting which resulted in the death of Camille Love and the injuries to Joshua Love.

- b. The State presented sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of conspiracy to commit murder.

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement. CP 319-351 (Jury Instruction 20); RCW 9A.28.040(1). The State need not show a formal agreement to commit the crime. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669, *review denied*, 133 Wn.2d 1021, 948 P.2d

389 (1997). Conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action. *Barnes*, 85 Wn. App. at 664, 932 P.2d 669. The State can demonstrate concert of action by showing the parties working understandingly, with a single design for the accomplishment of a common purpose. *State v. Casarez–Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987) (citing *Marino v. United States*, 91 F.2d 691, 694 (9th Cir.1937), *cert. denied sub nom.*, *Gullo v. United States*, 302 U.S. 764, 58 S.Ct. 410, 82 L.Ed. 593 (1938)). Also, a conspiracy may be proven through circumstantial evidence. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997); *State v. Brown*, 45 Wn. App. 571, 579, 726 P.2d 60 (1986).

The conspiracy statute requires a lesser act than does the attempt statute. *State v. Dent*, 123 Wn.2d 467, 477, 869 P.2d 392 (1994). Conspiracy requires a “substantial step in pursuance of [the] agreement” rather than a “substantial step toward the commission of [the] crime” as for attempt. *Dent*, 123 Wn.2d at 477. Evidence of preparatory conduct which furthers the ability of the conspirators to carry out the agreement is sufficient to establish a substantial step under the conspiracy statute. *Dent*, 123 Wn.2d at 477.

Washington implicitly recognizes that the subject crime of the conspiracy is an element. *State v. Smith*, 131 Wn.2d 258, 262–63, 930

P.2d 917 (1997). Here, the subject crime is first degree murder. Thus, the State had to prove an agreement existed, under circumstances manifesting an extreme indifference to human life, to conduct which created a grave risk of death to any person. CP 319-351 (Jury Instruction 12); RCW 9A.32.030(1)(b). Participation in a drive-by shooting may support a charge of first degree murder by extreme indifference if the victim dies. *See State v. Guzman*, 98 Wn. App. 638, 646, 990 P.2d 464 (1999) (“Although the crime of murder by extreme indifference requires a death, it does not require a specific intent of death. Instead, the facts need show merely that Mr. Guzman knew that his actions, along with Mr. Madera’s actions, were extremely dangerous, and yet he was indifferent to the consequences.”); *see also State v. Mee*, 168 Wn. App. 144, 275 P.3d 1192 (2012) (Defendant charged with first degree murder by extreme indifference for firing at a house from a car.).

Here, sufficient circumstantial evidence supports defendant’s conspiracy conviction. Defendant’s own statements show that he was aware of the plan to retaliate against rival gang members by shooting guns at them. Exhibit 5, 5E, 5F, 138. Defendant was present at the meetings in which Mr. Zuniga directed various gang members to acquire a stolen vehicle, guns, and cell phones. RP 938, 1922, 2544. Defendant was also

present when Mr. Zuniga directed Mr. Messer to drive the stolen van and Mr. Mex to shoot at the targets from the van. RP 1929.

As noted above, defendant accepted his assignment to drive around the east side of Tacoma looking for police and potential targets. While defendant claimed that he did not engage in such activity, he admitted he went to the directed location and Mr. Gonzalez testified that defendant called Mr. Zuniga to report the location of police officers in the area. Defendant's conduct shows that he agreed to engage in an activity which exhibited an extreme indifference to human life.

Taken in the light most favorable to the State, there was sufficient evidence to support the jury's finding that defendant agreed with his fellow gang members to engage in a drive-by shooting, which manifested an extreme indifference to human life.

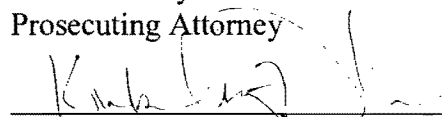
Defendant's argument that there was insufficient evidence to convict him of conspiracy to commit murder is flawed as the basis for the murder accusation was not based on premeditation. The State charged defendant with first degree murder by extreme indifference. To prove conspiracy, the State did not have to prove that defendant agreed to commit murder; but that he agreed, through concert of action, to engage in conduct which created a grave risk of death and which, in fact, caused death.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions for murder in the first degree, assault in the first degree, and conspiracy to commit murder in the first degree.

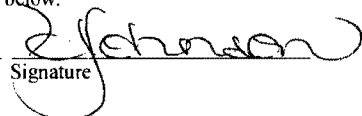
DATED: MARCH 21, 2013

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Date 3/21/13 Signature

PIERCE COUNTY PROSECUTOR

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